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**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of an Appeal of a Department
Decision Denying in Part a Game Bird and Animal
Farm License to Steven Messner, Oakfield,
Wisconsin

Case No. IH-98-01

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On September 10, 1997, Steven Messner filed an application with the Department of Natural Resources for a game farm license pursuant to sec. 29.574, Stats. The application sought licensing for 277.14 acres located in the counties of Dodge and Fond du Lac. On November 20, 1997, the Department issued Game Farm License No. 11728 to Mr. Messner; however the license was for only 157.14 acres of the 227.14 acres for which licensing was sought.

Steven Messner, by his Attorney Thomas B. Sewall, requested a hearing pursuant to sec. 227.42, Stats., to review the partial denial of the application. By letter dated January 8, 1998, the Department granted the request for a contested case hearing. On February 24, 1998, the Department filed a Request for Hearing with the Division of Hearings and Appeals.

Pursuant to due notice a hearing was held on March 26, 1998, in Fond du Lac, Wisconsin, before Mark J. Kaiser, Administrative Law Judge.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the parties to this proceeding are certified as follows:

Steven Messner, by

Thomas B. Sewall, Attorney
P. O. Box 310
Waupun, WI 53963-0310

Wisconsin Department of Natural Resources, by

Michael Lutz, Attorney
P. O. Box 7921
Madison, WI 53707-7921

FINDINGS OF FACT

1. Steven Messner owns 120 acres of land in the Town of Oakfield, Fond du Lac County. He leases an additional 120 acres of land from his father, David Messner, and 37.14 acres of land from Glen Rosenau. The land Steven Messner leases from his father is also located in the Town of Oakfield, Fond du Lac County. The land Steven Messner leases from Glen Rosenau is located in the Town of LeRoy, Dodge County.

2. In total Steven Messner owns or controls a total of 277.14 acres of land in the Town of LeRoy, Dodge County and the Town of Oakfield, Fond du Lac County. By application dated September 10, 1997, Steven Messner applied for a license to operate a game farm on this land.

3. On November 6, 1997, the Department of Natural Resources (Department) issued a license to Steven Messner for 157.14 acres of the property. The license was for pheasant and was valid until December 31, 1997.

4. On November 20, 1997, the Department issued Findings of Fact, Conclusions of Law, License and Conditions. This document set forth the grounds for denial of a license for the 120 acres controlled by Steven Messner for which a game farm license was not approved or issued. The reason for the partial denial of the application is that the 120 acres are within ¼ mile of land owned by the Department, which is allegedly managed for pheasants. Sec. 29.574(3m), Stats., prohibits the licensing land for a game bird or animal farm which is located within ¼ mile of land owned by the Department, which is managed in whole or in part for pheasants.

5. The land owned by the Department is a farm purchased from Merlin Marks on March 24, 1995 (Marks property). The Marks property is a 57.18 acre parcel. Prior to its purchase by the Department, 49.18 acres of the property was used as cropland. The Marks property also has a wooded upland that is approximately four acres in size and a quarry site that is also approximately four acres in size.

6. The Marks property was purchased by the Department as part of the its Glacial Habitat Restoration Area Project (HRA project). The ultimate purpose of the HRA project is to recreate the landscape in this area as it appeared in the 1930s and 40s. This landscape was described as scattered areas of wildlife habitat within an agricultural community. The Department is recreating grasslands and wetlands on the Marks property. Once the habitat is restored, the Marks property should be prime habitat for grassland birds, including ring-necked pheasants, and nesting waterfowl.

7. The Department entered into a share cropping agreement with Bob Kollmann covering 46 acres of the Marks property. The sharecropping agreement began on March 3, 1995, and terminates on December 31, 1998. Under the terms of the agreement, Mr. Kollmann is allowed to cut hay on the Marks property in exchange for planting wild grass and forbs and other labor to recreate grasslands on the property. As a result of the cutting allowed under the sharecropping agreement, the Marks property does not currently contain suitable cover for pheasants.

8. The applicant does not dispute that the subject 120 acres are within ¼ mile of the Marks property, he disputes whether the Marks property is managed for pheasants. The Department's witnesses admitted that they are unaware of any pheasants on the Marks property currently and that they have no plans to stock pheasants on the Marks property any time in the future.

9. The primary reason for the prohibition against licensing a game farm on land which is within ¼ mile of land managed for pheasants is that game farm stocked pheasants are genetically inferior to free roaming pheasants. A concern exists that the stocked pheasants will pollute the gene pool of the free roaming pheasants. There is also a concern that the stocked pheasants will pass diseases to the free roaming pheasants.

10. The issue in this case is whether the activities that the Department is carrying out on the Marks property fall within the scope of the phrase "managed in whole or in part for pheasants." Although there is no evidence that pheasants currently exist on the Marks property and the Department has no plans to stock pheasants on this property, the Department's goal is to recreate habitat that will be prime pheasant habitat. At that time undoubtedly wild pheasants will exist on the property. Stocked pheasants will constitute a threat to the wild pheasants. The fact that the Department is attempting to recreate an area that will be prime habitat for pheasant and that pheasants are one of the specifically targeted species which the Department is attempting to attract to the Marks property falls within the legislative intent of the phrase "managed in whole or part for pheasants."

Since there is no evidence that pheasants currently exist on the Marks property and the Department witnesses estimate that it will be several years before the Marks property will contain a significant amount of habitat which is suitable for pheasants, Mr. Messner argued that it is speculative and arbitrary to deny his application for a game farm at this time. However, although game farm licenses are issued on an annual basis, the Department contends that once a game farm license is issued it is automatically renewed each year. If a game farm license was issued to Mr. Messner for the 120 acres which are located within ¼ mile of the Marks property, the Department could not refuse to renew the license when the land did become suitable habitat for pheasants. Accordingly, a decision must be made based on the Department's purposes and ultimate goals in acquiring the Marks property, not its current condition.

11. The acreage listed in the Messner application was not in operation as a licensed game farm prior to May 24, 1961.

CONCLUSIONS OF LAW

1. The Department of Natural Resources has the authority pursuant to secs. 29.572 and 29.574, Stats., to issue Game Farm licenses to the owner or lessee of any lands within the state suitable for the breeding and propagating of game, birds or animals.

2. Approximately 120 acres of lands leased by Steven Messner are within ¼ mile of lands owned by the Department of Natural Resources. Section 29.574(3m), Stats., provides in relevant part:

No game bird and animal farm license shall be issued after May 24, 1961, other than those already in operation for any area less than one-quarter mile from the exterior boundaries of an approved or federal wildlife area, public hunting grounds or refuge which is managed in whole or in part for pheasants.

As discussed in the Findings of Fact, the Marks property is being managed for pheasants. Accordingly, the 120 acres located within ¼ mile of the Marks property cannot be licensed as a game farm.

3. The Division of Hearings and Appeals has the authority to issue the following order.

ORDER

The Department's Order issued on November 20, 1997, denying Mr. Messner's application for a game farm license for the 120 acres located within ¼ mile of the land owned by the Department is affirmed.

Dated at Madison, Wisconsin on May 15, 1998.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: Mark Kaiser
MARK J. KAISER
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.